APPEAL NO. 93417

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). A contested case hearing, (hearing officer) presiding, was opened in (city), Texas, on April 15, 1993, and the record was closed on April 19, 1993. The issues at the hearing were: 1) whether the respondent (claimant herein) was injured in the course and scope of her employment; 2) whether the claimant gave timely notice of any such injury to her employer; and 3) whether the claimant had disability as a result of any such injury.

The hearing officer found that the claimant was injured in the course and scope of her employment and timely reported her injury to her employer. The hearing officer also ruled that the claimant had disability as a result her injury since (date) and the claimant is entitled to temporary income benefits (TIBS) from that date until she ceases to have disability or reaches maximum medical improvement (MMI).

The appellant (carrier herein) in its request for review does not seek review of the hearing officer's findings as to injury or timely notice, but only on the hearing officer's finding of disability and only disputes disability for the period between March 27, 1992, and December 7, 1992. Thus the issue before us on appeal is whether the claimant had disability between March 27, 1992, and December 7, 1992. The thrust of the carrier's argument is either that the evidence did not establish the disability of the claimant during this time period, or that the findings of the hearing officer are not sufficient to allow the carrier to compute TIBS owed for this period of time. The claimant files no response to the carrier's request for review.

DECISION

Finding no reversible error and the decision of the hearing officer not to be against the great weight and preponderance of the evidence, we affirm.

The claimant had worked for (employer) for twelve years. On February 22, 1992, she was performing her usual job as food packer when, while making up boxes, she slipped and fell striking her buttocks and arms. The claimant testified that she reported her accident to her supervisor the next day, but because she did not believe herself seriously injured she continued to work. However, one morning after being unable to get out of bed she called (Dr. B), her family doctor, and made an appointment to see him.

Claimant testified that Dr. B recommended she take six weeks off work and even suggested she not go back to work. Claimant testified that she requested Dr. B to return her to work because she feared losing her job. During this period of time the employer was selling the plant in which claimant worked to new employer) and in fact the transfer of ownership took place on March 16, 1992. Claimant testified that she desired to return to work before the transfer took place because no one knew how the new employer would deal with the employees of the employer and she was afraid that if she did not return she would

lose her job.

Dr. B released the claimant to return to work on March 16, 1992, but restricted her to five hours of work per day. On March 27, 1992, Dr. B extended the claimant's hours from five to eight hours per day but continued her on lifting, bending and stooping restrictions. There is evidence in the record that prior to her injury she frequently worked 10 to 12 hour shifts.

Although there is evidence that there were periods of improvement in the claimant's back condition, she testified that she found it difficult to work eight hours per day and had difficulty doing the work assigned. Dr. B referred the claimant to a neurosurgeon, (Dr. J), on August 28, 1992. Dr. J performed a myelogram which indicated a soft disc protrusion at the L4-5 level. The claimant testified that her increasing difficulty at work, particularly her difficulty in working longer shifts, led the new employer to lay her off work in October 1992.

Claimant later switched her medical treatment from Dr. B. to (Dr. Q), an osteopath, who first examined her on December 7, 1993, and placed her on an off work status. Dr. Q ordered an MRI performed which showed a disc protrusion at L4-5 and also ordered an EMG and nerve conduction studies which confirmed the MRI results.

Article 8308-1.03 (16) (1989 Act) states: "'Disability' means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." In the present case the carrier argues that the evidence was insufficient to show that the claimant met this statutory definition between March 27, 1992, and December 7, 1992. The carrier contends that the evidence shows that by March 27, 1992, the claimant had returned to work working eight hours per day, basically the same hours that the claimant worked before the injury. The carrier also argues that the evidence is vague as to when the claimant stopped working for the new employer and that it only clearly shows she no longer worked for the new employer after Dr. Q placed her off work on December 7, 1992. While the carrier concedes that the claimant made a lower hourly wage after returning to work with new employer on March 27, 1992, the carrier maintains that all of employer's former employees were paid at a lower hourly rate and this had nothing to do with the claimant's injury and therefore was not a reduction in wages <u>because</u> of a compensable injury. This whole line of argument by carrier boils down to an argument that the evidence is insufficient to prove disability for the period in question.

Article 8308-6.34(e) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence, as well and the weight and credibility that is to be given the evidence. It was for the hearing officer, the trier of fact, to resolve the inconsistencies and conflicts in the evidence. <u>Garza v. Commercial Insurance Company of Newark, New Jersey</u>, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness.

Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Fort Worth 1977, writ ref'd n.r.e.; Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 286 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). In the present case, there is evidence to support the decision of the hearing officer in regard to disability. As we have frequently observed the testimony of the claimant may be sufficient to establish disability. Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992; Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992.

The carrier's second and somewhat related point is that the hearing officer's findings are insufficient to allow the carrier to determine what it owes in TIBS because there was no finding by the hearing officer as to the claimant's preinjury average wage or her earnings after injury. Essentially the carrier argues that the hearing officer should not have ordered the carrier to pay TIBS without making findings allowing the carrier to compute the amount to TIBS owing.

At the beginning of the hearing all the parties agreed as to the issues to be determined at the hearing. The agreed upon issues were injury, notice and disability. Those are the issues which the hearing officer addressed and the parties presented evidence upon. The carrier's position is that in order to find disability, the fact finder must find average weekly wage (AWW) and weekly earnings after an injury. This essentially confuses the issue of disability with the question of the proper rate of TIBS.

The statutory definition of disability cited means the inability to obtain and retain employment at wages equivalent to the preinjury wage. Article 8308-1.03 (16) (1989 Act). To find disability it is not required to quantify a decrease in wages, but merely to find that they are not equivalent. Quantification of the difference between preinjury and postinjury wages is the question of the proper rate of TIBS and this is a different issue than that of disability. The question of the proper rate of TIBS itself is comprised of two issues--the employee's AWW prior to the injury and the employee's weekly earnings after injury. *See* Article 8308-4.23 (1989 Act); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 128.1 *et seq*. and 129.1 *et seq*. (TWCC Rules 128.1 *et seq*. and 129.1 *et seq*.)

Neither of these issues, AWW or weekly earnings after injury, was before the hearing officer and thus his not making a finding on them is not reversible error. The hearing officer can order the carrier to pay TIBS without calculating the amount of TIBS the carrier owes.

It is the duty of the carrier to determine the proper amount of TIBS and if a dispute develops it may be resolved through the dispute resolution process.

For the foregoing reasons, the decision of the hearing officer is affirmed.

_____

Gary L. Kilgore
Appeals Judge

CONCUR:

_____

Philip F. O'Neill
Appeals Judge

_____

Lynda H. Nesenholtz
Appeals Judge